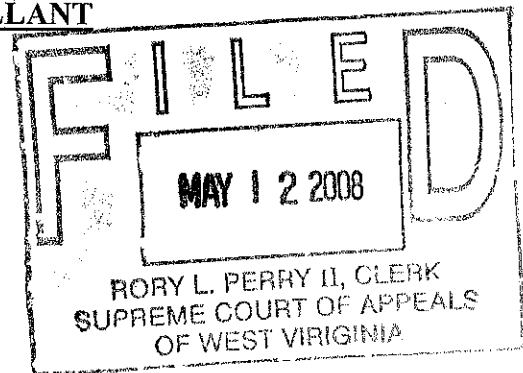

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33891

IN RE TAX ASSESSMENT
OF THE FOSTER FOUNDATION'S
WOODLANDS RETIREMENT COMMUNITY

CIVIL ACTION NO. 07-C-214
Judge John L. Cummings

REPLY BRIEF OF APPELLANT



Daniel J. Konrad, Esquire (WVSB # 2088)
Chad D. Camper, Esquire (WVSB # 10293)
HUDDLESTON BOLEN LLP
611 Third Avenue
Huntington, WV 25701
(304) 529-6181
Counsel for Plaintiff/Appellant

TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES	ii
KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING.....	1
STATEMENT OF THE FACTS	2
DISCUSSION OF LAW AND ARGUMENT	6
I. The Foster Foundation has established by clear and convincing evidence that the true and actual value of Woodlands is \$14,900,000.	7
II. The Assessor's and the County Commission's comparison of Woodlands to the Courtyard Apartments and to Maplewood resulted in the Woodlands being assessed far in excess of its true and actual value.....	7
A. The Courtyard Apartments is a for-profit entity distinctly different from the Woodlands	9
B. The County Commission improperly relied on a comparison between Woodlands and Maplewood to determine the alleged fair market value of Woodlands	10
III. The Foster Foundation's (and other appellants joined in this appeal) argument that County Commissions have impermissible conflicts of interest remain largely unchallenged.	12
IV. The County Commission's argument that altering the current system would result in chaos throughout the State is without merit.....	12
PRAYER FOR RELIEF	15

TABLE OF AUTHORITIES

CASES

<u>Bayer MaterialScience, et al, v. State Tax Commissioner, et al.,</u> Nos. 33378, 33880, and 33881.	15
<u>Kline v. McCloud</u> , 326 S.E.2d 715 (W.Va. 1984).....	6
<u>Maplewood Community, Inc. v. Craig</u> , 216 W.Va. 273, 607 S.E.2d 379 (W.Va.,2004)	8, 12
<u>State ex rel. Ellis v Kelly</u> , 145 W. Va. 70, 112 S.E. 2d 641 (1960).....	15

STATUTES

W. Va. Code § 11-3-1	1, 6, 9
W. Va. Code § 11-3-24	1
W. Va. Code § 11-3-25	2
W. Va. Code § 30-38-1	3
W. Va. Code § 30-38-1(a).....	3
W. Va. Code § 30-38-4(d)	3

CONSTITUTIONAL PROVISIONS

Article X, Section 1, of the Constitution of West Virginia.....	1
---	---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE TAX ASSESSMENT
OF THE FOSTER FOUNDATION'S
WOODLANDS RETIREMENT COMMUNITY

CIVIL ACTION NO. 07-C-214
Judge John L. Cummings

FROM THE CIRCUIT COURT OF CABELL COUNTY

REPLY BRIEF OF APPELLANT

COMES NOW the Appellant, Foster Foundation, by counsel, and hereby files its Reply Brief pursuant to the West Virginia Rules of Appellate Procedure. For its Reply Brief, the Foster Foundation states as follows:

KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING

Pursuant to the provisions of W. Va. Code § 11-3-24, the Foster Foundation appeared before the County Commission on February 9, 2007 and contested the appraised value of the Woodlands for tax year 2007. At the hearing, the Foster Foundation submitted information, including the reports, findings, and expert testimony of licensed real estate appraiser Robert K. Withers. Neither the Assessor nor the County Commission submitted any written evidence concerning the Assessor's valuation. By Order dated February 22, 2007, the County Commission set the assessed value of Woodlands at \$29,759,000 for tax year 2007. In doing so, the County Commission valued Woodlands far in excess of its true and actual value in contravention of the provisions of W. Va. Code § 11-3-1, *et. seq.* and Article X, Section 1, of the Constitution of West Virginia.

Pursuant to the provisions of W. Va. Code § 11-3-25, the Foster Foundation appealed the Order of the County Commission to the Circuit Court of Cabell County. By Order entered September 6, 2007, the circuit court affirmed the February 22, 2007 findings of the County Commission. The Foster Foundation then filed this appeal.

STATEMENT OF FACTS

1. The Foster Foundation is a 501(c)(3) non-profit corporation engaged in the operation of the Woodlands, which is a home for the aged not conducted for private profit. The Foster Foundation maintains a long established policy with its residents to care for them for life regardless of ability to pay. Accordingly, since 1923, the Foster Foundation has been granted and has maintained tax exempt status under the Internal Revenue Code.

2. The Cabell County Assessor's office lists and values all property in Cabell County, West Virginia, including the Woodlands, in order to assess ad valorem real property taxes according to the fair market value of property. By letter dated January 2, 2007, the Cabell County Assessor's office notified the Foster Foundation that for tax year 2007 the assessed value of the Woodlands would be based upon an appraised value of \$38,137,300.

3. On or about January 31, 2007, the Foster Foundation filed an Application for Review of Property Assessment with the County Commission challenging the Assessor's appraised value of \$38,137,300 for tax year 2007.

4. By letter dated January 24, 2007, the Foster Foundation was informed that its hearing before the County Commission would be on February 9, 2007 and that it must submit "Clear and convincing evidence", which by definition means 'formal appraisals and/or expert testimony by qualified people,' to prove that the assessment is in fact erroneous". See Letter from Cabell County Commission dated January 24, 2007.

5. Prior to the hearing, the Assessor changed the appraised value to \$31,190,000.

6. West Virginia Code section 30-38-1, et seq. provides for licensing of real estate appraisers in West Virginia. Section 30-38-1(a) provides that only a person licensed by the West Virginia real estate appraiser licensing and certification board is authorized to make formal property appraisals or qualify as an expert relating to the valuation of real property within the state of West Virginia.

7. Accordingly, the Foster Foundation retained the services of Robert K. Withers, a licensed appraiser pursuant to West Virginia Code section 30-38-1 *et. seq.* to conduct an appraisal of the Woodlands. Mr. Withers has obtained West Virginia's highest accreditation as a State Certified General Real Estate Appraiser which, pursuant to West Virginia Code Section 30-38-4(d), authorizes him to conduct appraisals of all types of real estate. Mr. Withers conducted a detailed inspection of the Woodlands, comparable properties, and the market area and determined the fair market value of the Woodlands was \$14,900,000. See Robert K. Withers' Appraisal of the Woodlands at p. 17.

8. On February 9, 2007, the hearing on the Foster Foundation's Application for Review was conducted before the County Commission. Mr. Withers testified at the February 9, 2007 hearing that the Assessor's appraised value of the Woodlands is erroneous because of the factors identified in his report. Of primary concern is that a willing purchaser of the Woodlands would discount the value of the property by the assumed liabilities of caring for the approximately 300 current residents of the Woodlands for the remainder of their lives.

9. Furthermore, at the time the Foster Foundation built the Woodlands, as a non-profit, charitable organization Foster Foundation had always been exempt from ad valorem real property taxation for its other retirement facility. In fact, the Woodlands was constructed, in

part, using the proceeds of tax exempt bonds issued by the Cabell County Commission. In connection with the initial tax exempt bond issue, the project was appraised and the appraiser at that time, Mr. R. Terry Watson, stated that "This value estimate is predicated on the subject attaining tax-exempt status from its affiliation with the Foster Foundation of Huntington, West Virginia. . . . **Any change from this tax-exempt status could materially influence value, which would require a revision.**" See Robert K. Withers' Appraisal of the Woodlands at p. 3 (emphasis added). Mr. Withers agreed with Mr. Watson stating, "Thus, as Mr. Watson stated, the property is adversely impacted by a tax burden." Id.

10. Accordingly, Mr. Withers concluded that "the [Woodlands'] marketability is rated as poor, because it produces little or no profit. Additionally, there are clouds hanging over the property as to its status as a tax-exempt property for ad valorem purposes and the highly excessive tax assessment." Id. at p. 17.

11. At the hearing, the Foster Foundation learned that the Woodlands had been assessed by Mr. Brian Daniels, a county employee who was not licensed by the West Virginia real estate appraiser licensing and certification board and that of his 2,500 "assessments" for the year 2007, the Woodlands (a non-profit retirement community) was, surprisingly, his highest taxed entity in the entire City of Huntington.

12. The Assessor did not introduce any written evidence concerning the methodology, information used, or other bases of the Assessor's valuation at the hearing.

13. After all the evidence, testimony, and oral and written arguments were entered into the record, the County Commission informed the Foster Foundation that it would be notified by mail as to the Board's decision.

14. On February 22, 2007, the County Commission entered an Order reducing the appraised value of the Woodlands to \$29,759,000 for tax year 2007 without explanation. This value was far in excess of Mr. Wither's appraised value of \$14,900,000 and slightly less than the Assessor's latest valuation of \$31,190,000. The record reveals that the value adopted by the County Commission is approximately the amount of insurance that Foster Foundation testified that it carried in response to a question from the County Commission.

15. By letter dated February 26, 2007, the County Commission notified the Foster Foundation of its February 22, 2007 Order.

16. Based upon the Order of the County Commission, the Foster Foundation filed its Petition for Appeal in the Circuit Court of Cabell County seeking relief from the excessive assessment of the Woodlands' value.

17. On or about June 26, 2007, a hearing was conducted before the Honorable Judge John L. Cummings in the Circuit Court of Cabell County regarding the assessed value of the Woodlands Retirement Community for tax year 2007.

18. By Order dated September 6, 2007, Judge Cummings ruled that the Foster Foundation failed to prove by clear and convincing evidence that the County Commission erroneously valued its property and denied the Foster Foundation's request to have the assessed value of the Woodlands reduced to its fair market value of \$14,900,000. See Order.

19. On or about January 7, 2008, the Foster Foundation filed its Petition for Appeal challenging the assessed value of the Woodlands. On or about January 18, 2008, the County Commission of Cabell County filed its written response in opposition thereto. By Order dated March 13, 2008, this Court granted the Foster Foundation's Petition for Appeal.

20. On or about April 14, 2008, the Foster Foundation filed its Brief pursuant to this Court's March 13, 2008 Order and the West Virginia Rules of Appellate Procedure. On or about April 22, 2008, the County Commission filed its Brief.

21. The Foster Foundation now files its Reply Brief pursuant to the West Virginia Rules of Appellate Procedure.

DISCUSSION OF LAW AND ARGUMENT

I. THE FOSTER FOUNDATION HAS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT THE TRUE AND ACTUAL VALUE OF WOODLANDS IS \$14,900,000.

West Virginia Code section 11-3-1 requires that "[a]ll property shall be assessed annually . . . at its true and actual value". True and actual value means fair market value, which is what the property would sell for if it were sold on the open market. See Kline v. McCloud, 326 S.E.2d 715 (W.Va. 1984). The burden is on the taxpayer to demonstrate error with respect to the Assessor's valuation by clear and convincing evidence as West Virginia law currently presumes the Assessor's valuations to be correct.¹ Foster Foundation met its burden by introducing evidence from a highly qualified expert that clearly established that the true and actual value of Woodlands is \$14,900,000.

As detailed in its previously filed Brief, the Foster Foundation retained the services of Robert K. Withers, who has obtained West Virginia's highest accreditation as a State Certified General Real Estate Appraiser.² Mr. Withers prepared a comprehensive appraisal report which provided an in-depth analysis of the Woodlands along with various comparable properties. After

¹ As detailed in Foster Foundation's Brief, the imposition of a clear and convincing standard violates due process. However, in the instant case, the Foster Foundation met the heightened standard and proved by clear and convincing evidence that the Assessor's valuation was erroneous and that the true and actual value of Woodlands was \$14,900,000.

² Mr. Withers is also a certified real estate appraiser in Ohio and Kentucky.

a review of all applicable factors impacting fair market value, in his written report Mr. Withers concluded that a number of factors negatively impact the value of Woodlands and that the true and actual value of the property is \$14,900,000. In addition to his written report, Mr. Withers provided expert witness testimony at the February 9, 2007 hearing before the County Commission, which included testimony that the Assessor's appraised value of the Woodlands was erroneous based on the factors identified in his report.

Foster Foundation presented oral and written testimony from a licensed, certified appraiser with the highest possible credentials that the Assessor's value was erroneous. At this point, the burden was on the Assessor to produce evidence to rebut Mr. Withers' report and testimony and to establish that the Assessor's original assessment of Woodlands was in fact correct. Nevertheless, the Assessor failed to provide any written evidence reflecting what information was obtained and considered in reaching his valuation of Woodlands or showing that he complied with his obligation of due diligence in appraising the Woodlands at its fair market value. Furthermore, on appeal before the Circuit Court, the County Commission failed to produce any evidence as to what information it had obtained and considered in reaching its valuation of Woodlands. To date, the Foster Foundation has not received any written report (nor has any written report ever been submitted into evidence) detailing how either the Assessor or the County Commission arrived at their respective valuations of Woodlands.³

The County Commission argues in its Brief that the high burden of proof imposed on the taxpayer exists to "avoid the taxpayers coming in and saying 'well, I just think the assessment is

³ In their Brief, the only "evidence" from the entire record that the County Commission could point to was an oral statement made by Mr. Daniels at the February 9, 2007 hearing wherein he stated that he had compared the Woodlands to the Courtyard Apartments in Cabell County, West Virginia and the Maplewood facility in Harrison County, West Virginia. These two comparables are discussed in greater detail in Section II herein.

too high' without any further proof substantiating their position." (p. 6) Ironically, that is exactly what the Assessor did in this case. Surely, the burden imposed on a taxpayer does not grant the Assessor a free pass on substantiating an assessment. In any other instance the failure of a party to submit a written expert report or detailed testimony of a qualified expert on the issues that are expressly to be decided would result in an adverse decision.⁴ This is especially true in the instant case which involves the highly technical issue of appraising not-for-profit homes for the aged.⁵

Moreover, the County Commission's Brief contains several factual inaccuracies which serve to further exemplify its failure to seek out the proper information necessary for the valuation of the Woodlands. The County Commission claims that only one Woodlands resident eventually became unable to pay the monthly service fees. This claim is simply untrue. In actuality, however, the number of residents who subsequently became (or will become) unable to pay is irrelevant⁶ because it is the fact that all residents have life care regardless of their financial means that materially affects the value of Woodlands. The residents will not be "evicted" for failure to pay. This is a key distinction between Woodlands and a for-profit endeavor such as the Courtyard Apartments that has been ignored or glossed over by the Appellee. Furthermore, the County Commission falsely asserts that Woodlands' steady decline in net operating income is without merit. It is indisputable that the net operating income of Woodlands has seen a steady

⁴ This lack of evidence occurred at both the hearing in front of the County Commission and the appeal to the Circuit Court.

⁵ The imposition of ad valorem real property taxes on 501(c)(3) nonprofit retirement communities is relatively new after this Court's 2004 decision in Maplewood Community, Inc. v. Craig, 216 W.Va. 273, 607 S.E.2d 379 (W.Va.,2004).

⁶ Theoretically, all residents could eventually be unable to pay, and it is this uncertainty (among other factors) that would require any potential buyer to offset the purchase price to account for these liabilities that exist for an unquantifiable period of time.

decline over the past six years, dropping by more than two-thirds over that time period. See Chart reflecting the Net Operating Income of Woodlands prepared by Mr. Withers.

The County Commission's erroneous claims with respect to the application of Woodlands lifetime care policy and its declining operating income exemplify the Appellee's utter failure to seek out or consider any, much less all, information necessary to make an informed decision and to consider the unique characteristics of Woodlands as a not-for-profit home for the aged. As the County Commission points out in its own brief, the "County Assessor must seek out all information which would enable him to properly fulfill his legal obligation" in determining fair market value. That standard was clearly not met in the instant case resulting in the Woodlands being assessed far in excess of its true and actual value in contravention of West Virginia Code § 11-3-1, et. seq.⁷

Given the compelling evidence submitted by the Foster Foundation and the absence of any evidence supporting the Assessor's or the County Commission's valuation, the Foster Foundation has satisfied its burden in establishing that the Appellee's valuation was clearly erroneous and that the true and actual value of Woodlands is \$14,900,000.

II. THE ASSESSOR'S AND THE COUNTY COMMISSION'S COMPARISON OF WOODLANDS TO THE COURTYARD APARTMENTS AND TO MAPLEWOOD RESULTED IN THE WOODLANDS BEING ASSESSED FAR IN EXCESS OF ITS TRUE AND ACTUAL VALUE.

Although the Assessor is required to seek out all information needed to determine the fair market value of properties there is no requirement that the Assessor or County Commission obtain the opinion of a licensed appraiser or otherwise demonstrate that the Assessor or the

⁷ As further evidence that Woodlands' assessment was far in excess of its fair market value, See Comparable Assessment & Tax Data Chart prepared by Mr. Withers which shows the taxes per square foot for the Woodlands are far in excess of other properties (even the for-profit office building located on property adjacent to the Woodlands where the taxes per square foot are \$.76 while the Woodlands is \$2.22).

County Commission has taken steps to acquire the information, knowledge or expertise to properly evaluate such specialized property. The absence of any such requirement resulted in the Assessor employing property comparisons that artificially inflated the assessed value of Woodlands by approximately \$15,000,000.

A "continuing care retirement community" like the Woodlands provides for housing and health-related services to an older person under an agreement effective for the life of the person. Except for hospital treatment, at no time must the resident leave Woodlands. Since a resident of the Woodlands can move from apartment, to assisted living and then ultimately, if necessary, to nursing home services, all at the Woodlands, the State of West Virginia will not be required to subsidize the residents of the Woodlands by providing Medicaid benefits for any Woodlands resident - thus benefiting all residents of West Virginia.

Woodlands also furnishes its services at the lowest feasible cost, taking into consideration such expenses as the payment of indebtedness, maintenance of adequate reserves sufficient to ensure life care of residents, and reserves for physical expansion commensurate with the needs of the community and the existing resources of Foster Foundation. Housing and services provided by the Woodlands are specifically designed to meet the physical, emotional, recreational, social and similar needs of its residents. No governmental program subsidizes Woodlands. Unlike the facts of any other case previously before this Court, a resident of the Woodlands can move from an apartment, to an assisted living unit and then ultimately, if necessary, to a nursing home unit providing continuous care services, regardless of ability to pay. All such units are located at the Woodlands.

Accordingly, the Woodlands is a unique, special purpose property for which the comparisons allegedly performed by the Assessor (detailed below) were an inadequate and inaccurate way to determine the fair market value of Woodlands.

A. *The Courtyard Apartments is a For-Profit Entity Distinctly Different from the Woodlands.*

The Courtyard Apartments are located near Marshall University and primarily caters to students. In 2003, the Courtyard Apartments sold for \$19,300,000. See p. 16 of Mr. Withers report. The Courtyard Apartments consists of approximately the same square footage as Woodlands (285,413 and 296,460 respectively). Id. However, Courtyard Apartments is a for-profit entity. It is not encumbered by the lifetime care of its tenants regardless of their ability to pay. Yet, Woodlands is assessed at over \$10,000,000 more than the Courtyard Apartments sold for on the open market (or what reflects its fair market value). Moreover, in 2007, Woodlands taxes per square foot were \$2.22 while Courtyard Apartments were a mere \$0.90. See Comparable Assessment & Tax Data chart prepared by Mr. Withers. The Woodlands taxes per resident or bed in 2007 was a staggering \$2,347.00. Id.

Contrary to the County Commission's belief, the Woodlands is not a property an investor would buy like an apartment complex or a shopping center. There is a limited market of buyers for the Woodlands because it is a unique property (non-profit home for the aged). There is a clear difference between the cost value (cost of building the Woodlands which reflects the amount of fire insurance) and economic value. A charitable entity such as the Foster Foundation is not guided by a profit motive and may construct improvements for the benefit of the community it serves at a cost or replacement value greater than that for which it could expect to be able to resell the property in the open market. A charitable entity may impose, or have imposed upon it, limitations on the use and operation of its property that impact market value or

marketability, such as Foster Foundation's policy of continuing to provide care to its residents regardless of ability to pay.

The County Commission references a waiting list of approximately 470 people trying to get into the Woodlands. The existence of a waiting list at the Woodlands has no impact on its value because each new resident receives the same life care, which is why Woodlands remains a not-for-profit home for the aged today. Conversely, a waiting list at the Courtyard Apartments would likely have a positive impact on its fair market value since it would reflect the profitability of the apartments. This is substantially different from the non-profit Woodlands, which has vastly different responsibilities to its residents than a landlord would have to a tenant at the for-profit Courtyard Apartments.

B. *The County Commission Improperly Relied on a Comparison Between Woodlands and Maplewood to Determine its Fair Market Value of Woodlands.*

Mr. Daniels also allegedly compared Woodlands to the Maplewood facility located in Harrison County to justify the Assessor's valuation of Woodlands. However, during his testimony at the February 9, 2007 hearing, Mr. Daniels admitted that he had never actually been through Maplewood. See Transcript of Board of Equalization Hearing, p. 20. Comparing these two properties for the purposes of calculating the fair market value of Woodlands is equivalent to the proverbial apples to oranges comparison and resulted in a grossly inflated valuation of Woodlands.

Maplewood does not have a nursing home and does not have the commitment to care for its residents for life regardless of ability to pay.⁸ Additionally, Maplewood only offered its residents independent living apartments and assisted living units. Neither Maplewood nor its

⁸ This Court's decision in Maplewood Community, Inc. v. Craig, 216 W.Va. 273, 607 S.E.2d 379 (W.Va., 2004), further illustrates the numerous differences between Maplewood and Woodlands.

affiliated corporation offer nursing home services to its residents at no increased cost on a not-for-profit basis. As stated above, unlike the Maplewood facility, a resident of the Woodlands can move from an apartment, to an assisted living unit and then ultimately, if necessary, to a nursing home unit providing continuous care services, regardless of ability to pay. All such units are located at the Woodlands. The Foster Foundation offers its residents independent living, assisted living and nursing home services for life; all on a not-for-profit basis. The difference is critical in that the Foster Foundation residents will never have to leave Woodlands and become dependant on Medicaid.

Accordingly, the scope of care offered by Woodlands along with the financial liabilities incurred by the Foster Foundation in its operation of the Woodlands make any comparison to Maplewood for the purposes of establishing fair market value inaccurate.

III. THE FOSTER FOUNDATION'S (AND OTHER APPELLANTS JOINED IN THIS APPEAL) ARGUMENT THAT COUNTY COMMISSIONS HAVE IMPERMISSIBLE CONFLICTS OF INTEREST REMAIN LARGELY UNCHALLENGED.

The County Commission's Brief provides an approximately two paragraph response to the Foster Foundation's allegations of an impermissible conflict of interest, which includes the following statement: "The County surely would recognize that yes, technically, a perceived conflict of interest could exist". The Foster Foundation is unaware of any other tribunal setting where such a conflict of interest with the decision maker (either perceived or actual) would be permissible. This is especially true when the decision results in hundreds of thousands of extra dollars being put into the coffers of the County.

The County Commission, which is vested with both decision-making authority and a direct financial interest in the outcome of the proceeding, has an inherent conflict that prevents the Commission from being an impartial decision making tribunal as required by due process.

For example, the Foster Foundation believes its assessment was excessive by approximately \$14,859,000. In every contested valuation there is an inherent conflict between the County Commission's inconsistent roles as the overseer of the county finances and as the tribunal for hearing individual tax appeals. This conflict is magnified as the amount in controversy increases.

Accordingly, the County Commission's dual role as both a decision maker on the validity of taxpayer appeals and beneficiary of increased tax revenue resulting from higher tax assessments impermissibly results in a conflict of interest and denial of due process.

IV. THE COUNTY COMMISSION'S ARGUMENT THAT ALTERING THE CURRENT SYSTEM WOULD RESULT IN CHAOS THROUGHOUT THE STATE IS WITHOUT MERIT.

The County Commission essentially argues that if the Foster Foundation prevails in this appeal, then all 55 West Virginia counties will be affected and chaos would be created throughout the State. However, the County Commission states that for the year 2007, there were over 27,000 pieces of property whose values were increased. Only 21 of those property owners requested a hearing on their assessment. Accordingly, by the County Commission's own numbers for tax year 2007, only .0008% of property owners whose values were increased in 2007 appealed. This number is statistically insignificant and thus not reflective of "chaos."

The Foster Foundation simply believes that it is appropriate that the Assessor provide written evidence at the hearing before the County Commission to substantiate the original assessment and for an independent body not directly responsible for the budgetary and financial affairs of the county to consider the small number of property owners who appealed their increased tax assessments.

The West Virginia Supreme Court of Appeals has long recognized that “[t]he government and every one of its branches, departments, agencies, and subdivisions are bound by the prohibition of the due process guaranties, which extend to legislative, judicial, administrative, or executive proceedings.” State ex rel. Ellis v Kelly, 145 W. Va. 70, 112 S.E. 2d 641 (1960) (citations omitted). The mere claim that there is potential for “chaos” in the administration of tax assessments is insufficient to defeat the reality of the due process rights expressly reserved to the taxpayers of this State.

Finally, The County Commission argues that the current system “as it presently exists has proved to be fair, just and equitable.” However, the fact that this appeal along with the consolidated cases, Bayer MaterialScience, et al, v. State Tax Commissioner, et al., Nos. 33378, 33880, and 33881 is currently before this Court would seem to indicate otherwise.

PRAYER FOR RELIEF

WHEREFORE, the Foster Foundation respectfully requests that this Court REVERSE the Circuit Court of Cabell County and ORDER that Court to reduce the assessed value of Woodlands to its fair market value of \$14,900,000 for tax year 2007, provide such guidance as this Court deems necessary to prevent future violations of Appellant’s (and others similarly situated) due process rights along with such other relief that this Court may deem just and proper.

FOSTER FOUNDATION

BY: 

Counsel

Daniel J. Konrad, Esquire (WVSB # 2088)

Chad D. Camper, Esquire (WVSB # 10293)
HUDDLESTON BOLEN LLP
611 Third Avenue
Huntington, WV 25701
(304) 529-6181

Counsel for the Appellant, Foster Foundation

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33891

IN RE TAX ASSESSMENT
OF THE FOSTER FOUNDATION'S
WOODLANDS RETIREMENT COMMUNITY

CIVIL ACTION NO. 07-C-214
Judge John L. Cummings

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on the 12th day of May, 2008, a true copy of the foregoing "*Reply Brief of Appellant*" was served upon the following counsel by depositing the same, postage prepaid, in the United States Mail:

William T. Watson, Esquire
Post Office Box 1371
Huntington, West Virginia 25715

By. 

Of Counsel